

**Letter of Findings Number: 05-0381; 05-0376
Income Tax & Sales/Use Tax
For Tax Years 1997-2004**

NOTICE: Under [IC 4-22-7-7](#), this document is required to be published in the Indiana Register and is effective on its date of publication. It shall remain in effect until the date it is superseded or deleted by the publication of a new document in the Indiana Register. The publication of this document will provide the general public with information about the Department's official position concerning a specific issue.

I. Income Tax–Burden of Proof

Authority: [IC 6-8.1-5-1\(b\)](#); [45 IAC 15-5-3\(b\)](#); [IC 6-8.1-5-1\(a\)](#)

Taxpayer protests the imposition of proposed assessments of income tax.

II. Sales/Use Tax–Burden of Proof

Authority: [IC 6-8.1-5-1\(b\)](#); [45 IAC 15-5-3\(b\)](#)

Taxpayer protests the imposition of proposed assessments of sales/use tax.

III. Tax Administration–Negligence Penalty and Interest

Authority: [IC 6-8.1-10-1](#); [45 IAC 15-11-2](#)

Taxpayer protests the imposition of a ten percent negligence penalty and interest.

STATEMENT OF FACTS

Taxpayer is a retail store within a mall that sells and repairs watches and other jewelry. It should also be noted at the outset that any payments made by a taxpayer under Indiana's Tax Amnesty Program are precluded from being protested, and thus are not covered in the Letter of Finding. More facts will be provided below as needed.

I. Income Tax–Burden of Proof

DISCUSSION

Before examining the taxpayer's protest, it should be noted that the *taxpayer* bears the burden of proof. [IC 6-8.1-5-1\(b\)](#) states in pertinent part:

The notice of proposed assessment is prima facie evidence that the department's claim for the unpaid tax is valid. The burden of proving that the proposed assessment is wrong rests with the person against whom the proposed assessment is made.

The Indiana Administrative Code also states "[t]he burden of proving that a proposed assessment is incorrect rests with the taxpayer. . . ." [45 IAC 15-5-3\(b\)](#).

The owner of the retail store argues that he does not owe taxes for years prior to 2001 since he did not own the retail store for the entire period of the assessments. In other words, the owner is making an argument that is analogous to one that might be made in the context of a *responsible officer* being assessed. That type of argument is not applicable in the present case, since it is the *retail store* (i.e., the company) that has been assessed. (It should be noted, the taxpayer failed to develop the argument).

In correspondence, the taxpayer also takes issue with "proposed calculations" for the years 2002 and 2004.

The Department refers to [IC 6-8.1-5-1\(a\)](#), which states in part:

If the department reasonably believes that a person has not reported the proper amount of tax due, the department shall make a proposed assessment of the amount of the unpaid tax on the basis of the *best information available* to the department. (*Emphasis added*)

The taxpayer did not provide records, thus the audit report relies on the best information available (that included subpoenaing documentation from the mall in which the retail store is located).

In conclusion, the burden of proving the assessment wrong rests with the taxpayer, as provided in [IC 6-8.1-5-1\(b\)](#). Taxpayer has not met this burden.

FINDING

Taxpayer's protest is denied.

II. Sales/Use Tax–Burden of Proof

DISCUSSION

The audit report noted that the "taxpayer has not filed timely sales tax returns . . . and in some cases failed to file the sales tax return." The Department proposed assessments based on the best information available:

The auditor obtained a subpoena to issue to the Mall. As part of the rental agreement, the taxpayer is required to submit gross sales figures for each month by the tenth of the following month. Complete sales tax records were available for 1999, 2000, 2001, and 2003. For the year 2002, only partial records were available due to a change in ownership of the Mall.

Further the audit report states that after giving the taxpayer additional time to provide the requested information, it was not supplied. The audit report notes: "Therefore, it was determined that the gross sales figures provided to the Mall were the most accurate figures available."

The taxpayer's protest is basically the same argument made regarding in Issue I (*supra*). The taxpayer again has failed to carry its burden of proof (See [IC 6-8.1-5-1\(b\)](#) and [45 IAC 15-5-3\(b\)](#)).

FINDING

Taxpayer's protest is denied.

III. Tax Administration–Negligence Penalty and Interest

DISCUSSION

The taxpayer protests the imposition of penalty and interest. With regard to interest, the Department refers to [IC 6-8.1-10-1](#), which states in relevant part (*Emphasis added*):

(a) If a person fails to file a return for any of the listed taxes, fails to pay the full amount of tax shown on his return by the due date for the return or the payment, or incurs a deficiency upon a determination by the department, the person is subject to interest on the nonpayment.

...

(e) The department *may not* waive the interest imposed under this section.

With regard to the penalty, the Department refers to [45 IAC 15-11-2\(b\)](#), which states:

Negligence, on behalf of a taxpayer is defined as the failure to use such reasonable care, caution, or diligence as would be expected of an ordinary reasonable taxpayer. Negligence would result from a taxpayer's carelessness, thoughtlessness, disregard or inattention to duties placed upon the taxpayer by the Indiana Code or department regulations. Ignorance of the listed tax laws, rules and/or regulations is treated as negligence. Further, failure to read and follow instructions provided by the department is treated as negligence. Negligence shall be determined on a case by case basis according to the facts and circumstances of each taxpayer.

[45 IAC 15-11-2\(c\)](#) provides in pertinent part:

The department shall waive the negligence penalty imposed under [IC 6-8.1-10-1](#) if the taxpayer affirmatively establishes that the failure to file a return, pay the full amount of tax due, timely remit tax held in trust, or pay a deficiency was due to reasonable cause and not due to negligence. In order to establish reasonable cause, the taxpayer must demonstrate that it exercised ordinary business care and prudence in carrying out or failing to carry out a duty giving rise to the penalty imposed under this section.

The taxpayer states in correspondence that "It is clear some records are inadequate and poor bookkeeping is evident. . . ." The taxpayer has failed to show that the "deficiency was due to reasonable cause and not due to negligence" as outlined in [45 IAC 15-11-2\(c\)](#).

FINDING

Taxpayer's protest is denied.

Posted: 08/02/2006 by Legislative Services Agency
An [html](#) version of this document.